VIA ECFS

Ms. Marlene H. Dortch Secretary Federal Communications Commission 445 12th Street, SW Washington, DC 20554

Re: Applications of Sprint Nextel Corporation and SoftBank Corp., IB Docket No. 12-343 Written *Ex Parte* Communication

Dear Ms. Dortch:

In its public interest review of the above-captioned applications, MediaFreedom.org¹ urges the Commission to consider recent disturbing steps taken by Softbank Corp. ("Softbank"), the proposed transferee, to thwart a rival bid for Sprint Nextel Corp. ("Sprint") from Dish Network Corp ("Dish"). The applications before the Commission seek approval for the transfer of control of Sprint to Softbank. As you may know, last month Dish made a competing bid for Sprint, which the Sprint Board is apparently evaluating.² Press reports indicate that the Sprint Board has raised concerns about Dish's ability to find financing to support its bid and that Sprint has not yet given Dish access to critical, detailed financial information because of this concern.³ Against this back drop, the press has recently reported that Softbank "may have threatened" banks that their participation in financing Dish's rival offer for Sprint could reduce their chances of landing a coveted position in the upcoming public offering of Alibaba Group Holding Ltd ("Alibaba"), the Chinese e-commerce giant of which Softbank is reported to own one-third.⁴

MediaFreedom.org is a free market-oriented 501(c)(3) non-profit corporation based in Alexandria, VA. Its main mission is to educate U.S. policymakers, the media and the public about the importance of marketplace guidance in sustainably "growing" the Internet and its underlying communications infrastructure. For more information, please go to www.MediaFreedom.org.

² "Sprint Forms Special Committee of Independent Directors to Review Unsolicited Proposal From DISH Network Corp." Sprint News Release (Apr. 22, 2013), *available at* http://newsroom.sprint.com/article_display.cfm?article_id=2569.

³ "Sprint Faces Mounting Pressure as Dish Lines Up Financing," Bloomberg (May 15, 2013), *available at* http://www.bloomberg.com/news/2013-05-15/dish-said-to-be-lining-up-four-banks-to-fund-sprint-bid.html; "Dish Network Is Lining Up Bank Financing in Bid to Purchase Sprint," The Kansas City Star (May 15), *available at* http://www.kansascity.com/2013/05/15/4237818/dish-reportedly-lining-up-bank.html#.

⁴ "Softbank Leans on Banks in Effort to Disrupt Dish's Sprint Bid," Financial Times (May 13, 2013), available at http://www.ft.com/cms/s/0/77c60e2a-bb99-11e2-82df-00144feab7de.html#axzz2TISMCSJ8.

According to press reports, at least one major Wall Street bank has withdrawn from financing the Dish bid because of this pressure.⁵

Softbank's reported actions to thwart Dish's bid raise several concerns for the Commission to consider carefully in its public interest analysis. First, the public interest is not served if, as reported, one bidder for a licensee threatens to impair or impede financing options and other related arrangements for that licensee that could benefit consumers. Second, the press reports highlight significant questions about Softbank's relationship with Alibaba, a large Chinese company, that warrant further exploration from a national security standpoint.

These issues are described in more detail below.

The Communications Act's Goal of Full and Fair Competition Is Thwarted Where a Company Acts to Block a Competitive Option That Could Benefit Consumers

It goes without saying that consumers benefit from vibrant marketplace competition. For this reason, "full and fair competition" in all telecommunications markets has repeatedly been recognized as a goal of the Communications Act and an essential component of the public interest. Such full and fair competition includes market participants being able to access all of the financing and strategic partnership options the marketplace has to offer. For this reason, the Commission's policy has long been to preserve – and certainly not to foreclose – such marketplace options.

Indeed, in the case of competing bids for FCC licensees, the Commission has adopted special procedures to preserve the ability of boards and shareholders to have choices in the face of competing bids. In this regard, the Commission has acted to remove potential impediments that could "be utilized, either by design or by unintended result, in a manner which favors either the incumbent or the challenger in disputes over corporate control," emphasizing that "marketplace considerations . . . should influence the decisions of the shareholders in tender offers and proxy contests." In doing so, the Commission explicitly recognized the public interest benefits when marketplace options are not artificially limited. In short, the Commission found that broadly preserving board and shareholder choice – such as to financing options and strategic partnerships – ultimately benefits consumers and thus serves a public policy goal.

However, Softbank's reported actions in seeking to reduce the financing options available to a rival bidder appear directly at odds with this goal and the Communications Act's directive to promote full and fair competition. Quite simply, Softbank's reportedly hardball tactics reveal a concerning antipathy to free and fair markets, thus raising questions about whether its future conduct will similarly be to foreclose marketplace options, including other strategic alliances, that might benefit consumers of communications services. As such, Softbank's conduct raises troubling concerns as to whether its proposed acquisition of Sprint will serve the public interest.

⁵ "Exclusive: Softbank Asks Banks Not to Finance Dish's Sprint Bid – Sources," Reuters (May 10, 2013), available at http://news.yahoo.com/exclusive-softbank-asks-banks-not-finance-dishs-sprint-210508801.html.

⁶ Tender Offers and Proxy Contests, Policy Statement, 55 Rad. Reg. (P&F) 2d 1536 (1986).

Softbank's Close Ties with Alibaba, a Chinese Company, Warrant Careful Scrutiny

Second, the press reports that banks participating in financing Dish's bid might be excluded or limited in participating in Alibaba's public offering raise a significant question about the relationship between Softbank and this large Chinese company. Excluding banks from its upcoming public offering would seem to be against Alibaba's own financial interests and thus a highly unlikely step for a commercial entity to take unless it benefits from the action in some other way. If Alibaba were to accept this limit to its own financing options in order to assist Softbank in its quest for Sprint, it raises a serious question whether Alibaba has some hidden interest in SoftBank that must be disclosed for Commission review and public comment.

The Communications Act and Commission's rules are clear that the Commission must thoroughly review and approve indirect owners and entities with control over common carrier radio licensees, particularly when they are foreign. ⁷ Indeed, the Commission recently revised its rules to require applicants for common carrier radio licenses:

...to identify and request specific approval in their Section 310(b)(4) petitions for any foreign individual or entity, or "group" of foreign individuals or entities, that holds or would hold directly, or indirectly through one or more intervening U.S.-or foreign-organized entities, more than five percent of the U.S. parent's total outstanding capital stock (equity) and/or voting stock, or a controlling interest in the U.S. parent. We also adopt a five percent identification and specific approval requirement for common carrier licensees subject to Section 310(b)(3) forbearance.⁸

To the extent that Alibaba is willing to act against its own financial interests to assist Softbank acquire Sprint, it would seem likely that Alibaba has some sort of interest in Softbank or the transaction that requires disclosure. Stated more directly – who truly controls Alibaba, and what level of control over SoftBank does Alibaba in fact have?

Disclosure and FCC review of such a relationship is particularly important here given the U.S. government's concerns about Chinese communications companies and their participation in the U.S. market. A recent investigative report by Chairman Mike Rodgers and Ranking Member C.A. Dutch Ruppersberger of the Permanent Select Committee on Intelligence of the U.S. House of Representatives warns of "the heightened threat of cyber espionage and predatory disruption or destruction of U.S. networks if telecommunications networks are built by companies with known ties to the Chinese state, a country known to aggressively steal valuable trade secrets and other sensitive data from American companies." As such, the report recommends that U.S.

⁷ 47 U.S.C. § 310(b); 47 C.F.R. §§ 1.919, 1.948, 1.2112(a) (specifying ownership disclosure requirements for Wireless Radio Services applicants); FCC Form 602 (Ownership Disclosure Information for the Wireless Telecommunications Services, Schedule A).

⁸ Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees Under Section 310(b)(4 of the Communications Act of 1934, as Amended, Second Report and Order, FCC 13-50 at ¶ 47 (April 18, 2013).

⁹ Investigative Report on the U.S. National Security Issues Posed by Chinese Telecommunications Companies Huawei and ZTE, A Report by Chairman Mike Rogers and Ranking Member C.A. Dutch Ruppersberger of the Permanent Select Committee on Intelligence, U.S. House of Representatives, 112th Congress (Oct. 8, 2012),

companies not do business with certain Chinese communications companies and that U.S. government systems, particularly sensitive systems, exclude Chinese equipment or component parts. Similarly, President Obama recently signed into law a provision that prohibits federal government acquisitions of information technology systems if they were "produced, manufactured or assembled" by an entity that is "owned, directed or subsidized" by the People's Republic of China.¹⁰

From a national security standpoint, the relationship of Alibaba, a very large Chinese company, to the proposed buyer of a major U.S. wireless carrier requires not only disclosure but careful evaluation.

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For the foregoing reasons, Softbank's reported actions to thwart Dish's bid for Sprint raise several serious concerns with respect to the above-captioned applications. Accordingly, MediaFreedom.org urges the Commission to investigate fully and consider these issues carefully as part of its public interest analysis.

Respectfully submitted,

Mike Wendy President, MediaFreedom.org

available at http://intelligence.house.gov/press-release/chairman-rogers-and-ranking-member-ruppersberger-warn-american-companies-doing.

H.R. 933, Consolidated and Further Continuing Appropriations Act, 2013, at § 516.